Nos. 14,648 and 14,649

In the United States Court of Appeals for the Ninth Circuit

CIVIL AERONAUTICS BOARD, APPELLANT

v.

FRIEDKIN AERONAUTICS, INC., d/b/a PACIFIC SOUTHWEST AIRLINES, APPELLEE

CIVIL AERONAUTICS BOARD, APPELLANT

v.

CALIFORNIA CENTRAL AIRLINES, INC., APPELLEE

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLANT CIVIL AERONAUTICS BOARD

STANLEY N. BARNES,
Assistant Attorney General.

LAUGHLIN E. WATERS,
United States Attorney,

DANIEL M. FRIEDMAN,
Special Assistant to the Attorney General, Department of Justice.

FRANKLIN M. STONE,
General Counsel,

JOHN H. WANNER,
Associate General Counsel,

ROBERT L. GRIFFITH,
Chief, Office of Compliance,

O. D. OZMENT,
Chief, Litigation and Research Division,

JOHN F. WRIGHT,
Compliance Attorney, Civil Aeronautics Board.

ROBERT L. PARK,
Attorney, Civil Aeronautics Board.

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JURISDICTIONAL STATEMENT

The complaints in these cases (R. 14,648, p. 3; R. 14,649, p. 3 [1]) were filed in the United States District

[1] The record herein consists of three volumes; one containing the pleadings in Case 14,648, one the pleadings in Case 14,649, and the third (Vol. II) containing the transcript of the hearing before the District Court. Record references not bearing a case number relate to Vol. II.

Court by the Civil Aeronautics Board pursuant to Section 1007 of the Civil Aeronautics Act of 1938 (*infra,* p. 25). The orders and judgments of which review is sought were entered on September 23, 1954 (R. 14,648, p. 85; R. 14,649, p. 45). Notices of appeal were filed on November 22, 1954 (R. 14,648, p. 87; R. 14,649, p. 47), and on February 9, 1955 this Court entered an order consolidating the appeals (R. 14,648, p. 92). The jurisdiction of this Court rests on 28 U. S. C. 1291 and 1292.

STATEMENT OF THE CASE

On May 6, 1954, the Civil Aeronautics Board filed in the United States District Court for the Southern District of California separate complaints alleging that, in violation of Section 401(a) of the Act, each appellee had engaged in interstate air transportation without a certificate of public convenience and necessity. The complaints sought both temporary and permanent injunctions against such unauthorized operations.

Answers to the complaints and motions for judgment on the pleadings were filed on July 12, 1954 by appellee Friedkin Aeronautics, Inc. ("Friedkin") (R. 14,648, pp. 8, 76) and on July 13, 1954 by appellee California Central Airlines, Inc. ("California Central") (R. 14,649, pp. 8, 44). Beginning on July 22, 1954, the district court heard evidence in a consolidated hearing on the Board's applications for preliminary injunctions (R. 107-359). At the conclusion of the Government's case, each appellee orally moved to dismiss the complaints (R. 365, 368).

On September 17, 1954, the district court (Judge Westover) held (R. 14,648, pp. 77-85) that appellees were not engaged in interstate air transportation, and

granted the motions to dismiss. Judgements denying the motions for temporary injunction and dismissing the complaints were entered on September 23, 1954 (R. 14,648, p. 85; R. 14,649, p. 45).

The evidence which the Government introduced is set forth in the argument, *infra* pp. 17-20. In brief, it showed that appellees are common carriers whose aircraft operate solely between points in the state of California, principally San Diego, Burbank and San Francisco. In addition to transporting local intrastate passengers between those points, appellees also carry "interstate" passengers, *i.e.,* passengers moving to and from out-of-state points who use appellees' intrastate services as an integral part of their continuous journey. Appellees carry these interstate passengers pursuant to arrangements with interstate carriers and with the knowledge that such passengers are engaged in interstate travel. Appellees do not have certificates of public convenience and necessity which are required under Section 401(a) of the Civil Aeronautics Act to engage in interstate air transportation.

In dismissing the complaints, the district court noted (R. 14,648, p. 78) that appellees have transported a "substantial" number of passengers whose journeys originate or terminate outside the state of California. It held, however, that a carrier whose aircraft does not cross state lines is not engaged in "interstate air transportation" as that term is defined in the Act. The Court stated (R. 14,648, p. 83) that although Congress had occupied "the entire field relative to safety regulation", Congress had not subjected "intrastate carriers, operating solely between points within the state" to the Board's economic regulatory jurisdiction, and that

the failure of Congress to preempt "the entire field" of economic regulation has left the states with "jurisdiction relative to their regular intrastate carriers."

STATUTES INVOLVED

The provisions of the Civil Aeronautics Act principally involved are set forth in the Appendix hereto (pp. 23 to 25). Other pertinent provisions of the Civil Aeronautics Act are cited or quoted in the text of this brief.

SPECIFICATIONS OF ERROR RELIED UPON

1. The District Court erred in holding that the economic regulatory provisions of the Civil Aeronautics Act have no application to a common carrier by air whose aircraft operate within the boundaries of a single state.

2. The District Court erred in failing to hold, upon the basis of the record below, that appellees are engaged in unauthorized interstate air transportation within the meaning and in violation of the Civil Aeronautics Act.

3. The District Court abused its discretion in denying the motions for temporary injunction.

4. The District Court erred in dismissing the complaints.

SUMMARY OF ARGUMENT

I

The decision of the District Court is incorrect because it is based on a misinterpretation of the applicable law. There is no question presented in these actions as to whether Congress has preempted or occupied the field of economic regulation of intrastate

common carriers by air to the exclusion of all state regulation, as the opinion of the District Court seems to suggest. The real issue is whether, under the statutory definition of "interstate air transportation" and applicable case law, the economic regulatory provisions of the Civil Aeronautics Act extend to physically intrastate operations insofar as they involve the carriage of a substantial number of passengers as part of a continuous interstate movement.

Interstate air transportation is defined by Section 1(21) of the Civil Aeronautics Act (*infra,* p. 24) in pertinent part to mean the carriage by aircraft of persons or property as a common carrier for compensation or hire "in commerce between" "a place in any State of the United States . . . and a place in any other State of the United States . . . whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation." Admittedly, all the requisites of jurisdiction are present here, except that appellee contends and the Court below has concluded that since appellee's aircraft do not cross state lines, appellee cannot be engaged "in commerce between" the various states.

The Court's conclusion in this respect is plainly erroneous. Congressional power over interstate commerce which forms the basis for enactment of the Civil Aeronautics Act, uniformly has been held to encompass activities and operations that take place within the boundaries of a single state. The test is the essential character of the commerce as intrastate or interstate, not the physical movement of the particular instrumentality employed. In the field of transportation, if, as here, the commerce is interstate in character,

the regulatory power of Congress attaches to it, notwithstanding the fact that some leg or portion of the movement of that commerce may involve operations solely within one state.

The legislative history of the Civil Aeronautics Act discloses, as does the face of the statute, that Congress intended to embody therein this traditional concept of commerce subject to its regulation. Proposed amendments which, if enacted, would have been open to a possible interpretation that Congress was confining the scope of the certificate provisions of the Act to only those situations where aircraft transcended state lines, were rejected by the Congress.

II

Since there is no question that appellees are, in fact, transporting a substantial number of interstate passengers pursuant to arrangements with interstate carriers, and inasmuch as the District Court's action rested solely on a mistaken view of the breadth of the applicable law, the Court below erred in denying the motions for preliminary injunction pending trial and dismissing the complaints. The equitable doctrine that a motion for a preliminary injunction is addressed to the sound discretion of the trial court has no application in this case because the District Court did not undertake to exercise any discretion in denying appellant's motion, but acted solely on the ground that the Court was without jurisdiction. Denial of a preliminary injunction founded upon a fundamental misconception of the controlling law is an abuse of discretion which requires reversal by this Court.

ARGUMENT

Introduction

There is no question that transportation performed wholly within a single state but moving in the stream of interstate commerce constitutes interstate transportation which is subject to Federal control.[2] Indeed, the district court recognized that fact (R. 14,648, pp. 83-84). The issue in this case is whether Congress, in the so-called "economic" regulatory provisions of the Civil Aeronautics Act, exercised that power so as to subject to Federal regulation an intrastate air carrier which transports a substantial number of interstate passengers pursuant to arrangements with interstate carriers under which the intrastate transportation constitutes either the initial or final leg of a continuous interstate journey, and the intrastate carrier has full knowledge of the interstate character of the traffic. The district court held that the Act is inapplicable. A brief discussion of the pertinent statutory provisions is necessary.

The Civil Aeronautics Act subjects both the "safety" and the "economic" aspects of air transportation to Federal regulation. Safety regulation relates to such matters as the licensing of qualified pilots and safe aircraft, and the operation of aircraft in accordance with

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[2] See *e.g.*, *The Daniel Ball*, 10 Wall. 557 (1870); *United States* v. *Union Stockyard & Transit Co.*, 220 U.S. 286 (1912); *Texas & New Orleans R.R. Co.* v. *Sabine Tram Co.*, 227 U.S. 111 (1913); *Railroad Commission of La.* v. *Texas & Pacific R. Co.*, 229 U.S. 336 (1913); *Galveston, Harrisburg & San Antonio R. Co.* v. *Woodbury*, 254 U.S. 357 (1920); *United States* v. *Capital Transit Co.*, 325 U.S. 357 (1945); *United States* v. *Capital Transit Co.*, 338 U.S. 286 (1949); *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947).

prescribed safety procedures.[3] It extends to operations in "air commerce" (Section 610), which is defined by Section 1(3) in terms sufficiently broad to cover both interstate and intrastate flights by common and private carriers. Cf. *Rosenhan* v. *United States*, 131 F. 2d 932, 935 (C. A. 10, 1942), cert. den., 318 U. S. 790 (1943).

Economic regulation deals with certification (licensing) of carriers, fixing of rates, acquisition of control, etc. The economic regulatory provision here involved is Section 401(a), which prohibits engaging in "air transportation" without a certificate of public convenience and necessity issued by the Board. Section 1(21) defines "interstate air transportation" as the common carriage by aircraft of persons or property "in com-

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The test is the essential character of the commerce, not the locale within which the carriers taking part in the movement operate. *Illinois Central R.R. Co.* v. *Fuentes*, 236 U.S. 157 (1915); *Pennsylvania R.R. Co.* v. *Clark Brothers Coal Mining Co.*, 238 U.S. 456 (1915); *Baltimore & Ohio Southwestern R.R. Co.* v. *Settle*, 260 U.S. 166 (1922); *United States* v. *Erie R.R. Co.*, 280 U.S. 98 (1929); *New York, New Haven & Hartford R.R. Co.* v. *Nothnagle*, 346 U.S. 128 (1953). If the movement is interstate, it is considered to begin when the persons or goods embark upon the first participating transportation medium and terminates at the ultimate point of destination, and thus is interstate from beginning to end. *The Daniel Ball, supra; Texas & New Orleans R.R. Co.* v. *Sabine Tram Co., supra; United States* v. *Yellow Cab Co., supra;* the *Capital Transit* cases, *supra. Cf. Airlines Transportation, Inc.* v. *Tobin*, 198 F. 2d 249 (C.A. 4, 1952), wherein the court held that an airline passenger commences his journey when he boards a limousine destined for the airport.

[3] The safety provisions of the statute are administered by the Civil Aeronautics Administration under standards and regulations promulgated by the Board. The Board administers the economic provisions of the Act. There is no question here involved as to safety regulation, and both appellees and the court below recognized that appellees' operations must be conducted in conformity with Federal safety requirements.

merce between" places in one state and places outside thereof.

The district court dismissed the complaints on the theory that although Congress has "occupied the field" in the case of safety regulation, it has not done so for economic regulation, and that the Board's jurisdiction in the economic area therefore does not extend to carriers whose aircraft do not cross state lines. We shall show, however, that although Congress has not occupied the entire field of economic regulation, it has, under the statutory definition of "interstate air transportation," given the Board jurisdiction to regulate the interstate aspects of intrastate carriers. We shall further show that the Board's evidence established that appellees have engaged in interstate air transportation within the meaning of the Act, and that the court therefore erred in denying our motions for preliminary injunction.

I

A Carrier May Engage in Interstate Air Transportation Under the Civil Aeronautics Act Even Though Its Aircraft Do Not Cross State Lines.

Section 401(a) of the Act requires that a certificate of public convenience and necessity issued by the Board be held by every carrier engaged in "air transportation." Section 1(10) defines these words as meaning "interstate, overseas or foreign air transportation or the transportation of mail by aircraft." Section 1(21) provides:

> "Interstate air transportation", "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for

compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the air space over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.[4]

We submit that the test for Federal regulatory jurisdiction under Section 1(21) as evidenced from the face of the statute, is whether the traffic carried is "in com-

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[4] This clause, "whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.", is indented here as in the enrolled bill. The bill as passed by the Senate, S. 3845, sets forth the definitions as they appear here except that the clause in question was extended to the left-hand margin of the page so that it unquestionably applied to all three subdivisions (a), (b) and (c). The conference committee, as shown by the text of the bill contained in the conference report, H. Rept. No. 2635, 75th Cong., 3d Sess., adopted the form of the Senate bill and Congress passed the bill as recommended by the conference committee, without change. Consequently, a typographical error must have been made in printing the enrolled bill.

merce between" states, and not whether the aircraft which performs the transportation itself crosses state lines.[5] If the word "commerce" was intended to relate to the interstate movement of the aircraft, the word would be unnecessary and meaningless. Moreover, clause (c) is inconsistent with application of the word to aircraft, since it covers commerce between a place in the United States and a place outside thereof, "whether such commerce moves wholly by aircraft or *partly by aircraft or partly by other forms of transportation*" (Emphasis supplied). A carrier which transports passengers on the intrastate leg of an interstate journey is carrying them "in commerce between" a place within the state and a place outside thereof, even though the carrier itself does not cross state lines. Congress frequently has used the words "in commerce between" states, or their equivalent, to subject intrastate aspects of interstate commerce to Federal regulation,[6] and we submit that it intended those words to

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[5] The only possible requirement contained in Section 1(21) that aircraft cross state lines before interstate air transportation is involved in the portion of the definition defining as "interstate" that transportation between "places in the same State . . . through the air space over any place outside thereof." This portion of the definition, like the remainder of the section, is merely declaratory of existing law in this respect. Transportation between places in the same State over land or water outside the State constitutes interstate transportation even in the absence of statutory definitions so declaring. See *e.g.*, *Hanley* v. *Kansas Southern Ry. Co.*, 187 U.S. 617 (1903); *Missouri Pacific Railroad Co.* v. *Stroud*, 267 U.S. 404 (1925); *Cornell Steamboat Co.* v. *United States*, 321 U.S. 634 (1944). See also *United Airlines* v. *P.U.C. of California*, 109 F. Supp. 13 (N.D. Calif., 1952) rev. 346 U.S. 402 (1953), and our brief to the District Court therein.

[6] See *e.g.*, Section 203(a) of the Interstate Commerce Act, 49 U.S.C. 303(a) and Section 6(a) of the Fair Labor Standards Act, 29 U.S.C. 206(a).

have the same meaning when it used them to define "interstate air transportation" in Section 1(21).

The legislative history of the Act supports this interpretation. The Act as finally passed in 1938 evolved from several years of Congressional study during which the legislation passed through a number of drafts. In 1935 bills were introduced (S. 3027, S. 3420) which would have exempted from the certification requirement air carriers which were "lawfully engaged in operation solely within any state * * *." This provision was similar to Section 206(a) of the Motor Carriers Act, which provides that carriers "lawfully engaged in operations solely within any state" pursuant to state authorization are not required to obtain from the Interstate Commerce Commission a certificate "authorizing the transportation by such carrier of passengers or property between places within such state." See *United States* v. *Union Pac. R. Co.*, 20 F. Supp. 665 (D. Idaho, 1937).

The Interstate Commerce Commission, which was then the proposed agency to administer the Act, pointed out that this provision in the bills "may result in unintentionally exempting interstate or foreign operations when performed by a carrier * * * engaged in operations solely within any state" (*Id.*, p. 117). The provision did not appear in subsequent drafts of the bills and was never adopted.[7] In the light of the presence

[7] The National Association of Railroad and Utilities Commissioners, which traditionally favor the retention of State control over transportation matters, proposed amendments to the bills designed to safeguard the jurisdiction of the States. Significantly, however, the Association's amendments (not adopted) were only to safeguard "purely intrastate commerce, not the commerce that is begun within the State, is carried to the end of a carrier's line, and then proceeds onward to some other State, which is purely

of such a provision in the Motor Carriers Act, its elimination from the Civil Aeronautics Act is a further indication that Congress did not intend to grant a comparable exemption to the interstate operations of intrastate air carriers.

The statement by Senator McCarran, upon which the district court relied for its conclusion that Congress intended that "intrastate carriers, operating solely between points within the state, would not be subject to the economic regulations" (R. 14,648, p. 83), did not relate to economic regulation but to safety regulation. Moreover, Senator McCarran's views as to the limited reach of the Board's power in the safety field were rejected since, as we have pointed out (*supra*, p. 7 ff.), Congress did occupy the field of safety regulation.

Contrary to the statement of the district court (R. 14,648, p. 84) we did not contend there, and we do not contend here, that Congress has occupied the entire field of economic regulation of air carriers. On the contrary, we recognize that there are important areas of economic regulation which have been left to the states.[8] Our argument rests on the narrower ground

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interstate commerce, and is properly subject to the jurisdiction of the Federal Commission. All that is excluded from the jurisdiction of the Federal Commission is that commerce which begins and comes to its end within a State." Hearings before a Subcommittee of the Committee on Interstate Commerce, U.S. Senate, 75th Cong., 1st Sess., on S. 2, pp. 367-368.

[8] California has been upheld in its assertions of authority to regulate intrastate rates of interstate air carriers. *Western Air Lines* v. *P.U.C. of California*, 342 U.S. 908 (1952); *People* v. *Western Air Lines*, 268 P. 2d 723 (Calif., 1954), appeal dismissed 348 U.S. 859 (1954). So far as we are aware, neither the California Courts nor the California Commission assert any power in the State to regulate rates charged for intrastate segments of interstate journeys. See

that here Congress exercised its broad power over interstate commerce sufficiently to reach interstate transportation conducted by intrastate carriers.

This construction of the Act also accords with the Board's settled administrative interpretation. The Board consistently has interpreted the economic regulatory provisions as applying to the traffic involved rather than to the physical operation of aircraft. Thus, in *Canadian Colonial Investigation,* 2 C.A.B. 752 (1941), the Board held that a carrier performing only operational stops within the United States was not engaged in air transportation. Comparing the definition of "air commerce" (Section 1(20), *infra*, p. 23), which specifically refers to "operation or navigation" of aircraft, with Section 1(21) which contains no such provision, the Board held:

> "The inclusion of that phrase in the definition of 'air commerce' and its omission from the definition of 'air transportation' very clearly implies that the scope of the latter is not controlled by the element of physical operation of aircraft."[9]

Consistent with this view, the Board has issued a number of certificates covering intrastate operations which form an integral part of interstate air transpor-

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People v. *Western Air Lines*, *supra* at pp. 737, 738.

Several states (but not California) also require that interstate carriers obtain certificates of public convenience and necessity for intrastate transportation performed in aircraft also carrying interstate traffic and crossing state lines.

[9] Apart from the fact that this construction patently is correct, any other view would cause serious repercussions in the international field. The right to make operational stops and to fly across the territory of other nations is based upon the concept that the nature of the traffic controls rather than the physical operation of aircraft.

tation (see *e.g., Continental A.L. et al., Texas Air Service,* 4 C.A.B. 478 (1943)), and it also regulates the rates charged by carriers for transporting traffic on the intrastate leg of an interstate journey. Similarly, the Board exercises full control over the interstate transportation provided by freight forwarders and other indirect air carriers who do not operate aircraft at all. See *Consolidated Flower Shipments, Inc.-Bay Area* v. *Civil Aeronautics Board,* 213 F. 2d 814 (C.A. 9, 1954). This construction is entitled to great weight as an interpretation by the agency charged with administering the statute.[10]

The fact that the Board has instituted judicial proceedings to enjoin unauthorized interstate operations by an intrastate carrier only once before does not suggest, as the district court stated (R. 14,648, p. 84), that the Board itself entertains doubts as to its jurisdiction. Rather, it reflects the fact that, in view of the general recognition by the air transportation industry that intrastate carriers who engage in interstate air transportation require certification, there has been no need for the Board to institute such proceedings. Moreover, in that prior instance the court implicitly recognized that operations of an intrastate carrier may constitute interstate air transportation under the Act. See *Civil Aeronautics Board* v. *Canadian Colonial Airways,* 41 F. Supp. 1006 (S.D. N.Y., 1940).[11]

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[10] *National Labor Relations Board* v. *Hearst Publications,* 322 U.S. 111, 130 (1944); *Unemployment Compensation Commission* v. *Aragon,* 329 U.S. 143, 153-154 (1946); *American Airlines* v. *Civil Aeronautics Board,* 178 F. 2d 903, 909, 910 (C.A. 7, 1949).

[11] In that case the Board sought to enjoin a carrier from engaging in interstate and foreign air transportation between two points within the State of New York without a certificate. The theory of the Board's case, as stated by the district court (p. 1008), was

Congress, in its statutory definition of air transportation, embodied traditional transportation law concepts under which the intrastate segments of an interstate journey are fully subject to Federal regulation (see *infra*, p. 17). We submit that the district court plainly erred when it held that appellees' interstate transportation activities are exempt from the Board's regulatory jurisdiction solely because appellees' aircraft do not fly beyond the California state line.

II

Appellees Have Engaged in Unauthorized Interstate Air Transportation, and the District Court Erred in Denying the Motions for Preliminary Injunction.

We have shown in Point I, *supra*, that a carrier is engaged in interstate air transportation within the meaning of the Act when it transports property or persons while they are moving or traveling in interstate commerce. We submit that the record in this case shows that a substantial number of appellees' passengers are moving in interstate commerce, and that the

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that the carrier's "passengers are using said air line as one leg or portion of an interstate or foreign journey, and that this is sufficient to characterize defendant's business as being interstate in quality, and defendant, therefore, is amenable to the Board." The Board sought an order, pursuant to Rule 34 of the Federal Rules of Civil Procedure, directing the carrier to produce records showing the identity and certain other information concerning its passengers. The court granted the motion, pointing out (*ibid.*) that the "main issue" was whether "defendant's intrastate transportation of passengers, who use the air line as one leg of an interstate or foreign journey, constitutes interstate commerce," and that the information which the Board sought would be "most helpful" to the Board in carrying its burden of establishing the facts as to the nature of the carrier's business.

The action was ultimately terminated by a consent decree which, insofar as Section 401(a) was concerned, enjoined the carrier from conducting interstate, overseas or foreign air transportation without prior certificate authority.

district court therefore erred in denying the motions for preliminary injunction.

It is well settled that when goods are shipped for carriage from a point in one state to a given point in another, they remain in interstate commerce at least until they reach the point "where the parties originally intended that the movement should finally end." *Illinois Central R.R. Co.* v. *Fuentes,* 236 U.S. 157, 163; *B.&O. S.W. R.R. Co.* v. *Settle,* 260 U.S. 166, 173-174. Likewise, a trip made pursuant to a ticket providing for transportation by air between a point in one state to a point in another, as is here the case (see *infra,* pp. 18-19), is an interstate trip from beginning to end, including any leg of the trip made between points in the same state. "When persons or goods move from a point of origin in one state to a point of destination in another, the fact that a part of that journey consists of transportation by an independent agency solely within the boundaries of one state does not make that portion of the trip any less interstate in character." *United States* v. *Yellow Cab Co.,* 332 U.S. 218, 228. See also *United States* v. *Capital Transit Co.,* 325 U.S. 357, 363.[12]

The record shows that transcontinental "non-scheduled" carriers operating between Burbank, California, and points such as Chicago, Dallas, Kansas City, and New York City utilize appellees' services to provide through transportation to and from other points in California served by appellees but not by the "non-scheds."

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[12] An interstate movement begins when the person or goods embark upon the first participating carrier, and terminates at the ultimate destination. *The Daniel Ball,* 10 Wall. 557; *Texas & New Orleans R.R. Co.* v. *Sabine Tram Co.,* 227 U.S. 111. Cf. *Airlines Transportation, Inc.* v. *Tobin,* 198 F. 2d 249 (C.A. 4), holding that an airline passenger begins his interstate journey when he boards a limousine destined for the airport.

This service is provided pursuant to operating arrangements between appellees and the "non-scheds," and results in a continuous interstate journey between points in the east and the California points which appellees serve (R. 184, 218, 219, 264, 319, 354, 357).

A passenger enplaning in the east receives a ticket from the transcontinental carrier or its agent for passage from the point of origin to his point of ultimate destination in California, such as Oakland and San Diego, even though that carrier does not itself operate beyond Burbank. (R. 149, 316). When a transcontinental air carrier arriving from the east has passengers aboard destined for such points other than Burbank, the customary practice is for the incoming flight to communicate from the last stop prior to Burbank with the carrier's office or agent in Burbank, who in turn arrange for onward passage on appellees' aircraft. (R. 251, 254, 331, 332). Normally such passengers do not even see the tickets which appellees issue for their transportation beyond Burbank, since the tickets are retained with the manifest to support a billing from appellees to the transcontinental carrier for the cost of the intra-California transportation (R. 158, 195, 242, 262, 275, 332, 351). In many instances, the passengers and/or their baggage have been transferred directly from the aircraft of the transcontinental carrier to appellees' aircraft at Burbank without undergoing any checkout procedure in the Burbank terminal (R. 286, 315). The passenger going beyond Burbank to points such as Oakland or San Diego upon appellees' aircraft pays only the single fare of the transcontinental carrier, which carrier in turn pays appellees for the cost of the "intrastate" leg of the journey (R. 127, 136, 144, 146, 195, 242, 243, 301, 313).

The procedures followed on eastbound flights are not materially different. On these flights from Burbank, passengers in the San Francisco, Oakland, and San Diego areas are issued two tickets, one for passage on appellees' aircraft to Burbank and the other for onward transportation from Burbank via the transcontinental air carrier to the point of ultimate destination outside of California (R. 211, 218, 219, 264, 268, 351). At Burbank the passenger makes his connection with flights to the east. Here again, the through passenger pays only the fare of the transcontinental air carrier from point of origin to point of ultimate destination, and no separate fare is collected for the intra-California portion of the transportation provided by appellee (R. 269).[13]

These facts with respect to ticketing methods, operations procedures, and financial responsibility for the cost of the "intrastate" portion of the interstate movement clearly establish the existence of arrangements between appellees and the transcontinental air carriers for the provision of connecting services at Burbank. Any efforts made by appellees to confine their operations to the carriage of local passengers have been

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[13] The evidence discloses numerous other steps taken by appellee Pacific Southwest during the period covered by the complaint to facilitate passenger connections with flights to the east. Thus, as in the case of westbound flights, on occasion the passengers and their baggage were transferred directly to the transcontinental flights (R. 287); luggage of transcontinental passengers aboard Pacific Southwest's flights was segregated in order to expedite the transfer (R. 285, 287); and Pacific Southwest's flight crews made inflight announcements informing passengers where they should check in at the Burbank terminal to verify their space on connecting carriers (R. 289). Pacific Southwest gives priority to passengers who are carried to Burbank for connections with transcontinental flights (R. 217, 219), and pays the transcontinental air carriers a commission for supplying it with the business (R. 146).

long since discontinued or are freely disregarded (R. 318, 354). Under the circumstances present here, appellees knowingly are transporting passengers who commence or terminate continuous interstate journeys upon appellees' aircraft in California. The fact that these passengers are required to transfer from one aircraft to another at Burbank to accomplish their purpose does not alter the essential character of the transportation as a continuous interstate movement, in which appellees are necessary participants.[14] Appellees are thus engaged in interstate air transportation, and it is a necessary consequence that in the absence of appropriate authority such operations are in violation of law.

We recognize that ordinarily the grant or denial of a preliminary injunction is within the discretion of the trial court. But that doctrine has no applicability where, as here, the injunction was denied not as an exercise of judicial discretion, but due to an erroneous view of the law.[15] The evidence here shows that ap-

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[14] "True, their interstate trip was broken at the District [District of Columbia] termini of Virginia buses, when they stepped from one vehicle to another. But in the commonly accepted sense of the transportation concept, their entire trip was interstate." *United States* v. *Capital Transit Co.*, 325 U.S. 357, 363 (1945). As noted in the *Capital Transit* decision, through ticketing of the passenger is not a necessary ingredient to a finding that an intrastate carrier is engaged in interstate commerce. Cf. *Western Oil Refining Co.* v. *Lipscomb*, 244 U.S. 346 (1917); *Baltimore & Ohio Railroad Co.* v. *Settle*, 260 U.S. 166 (1922).

[15] *Hanover Star Mill Co.* v. *Allen & Wheeler Co.*, 208 Fed. 513 (C.A. 7, 1913), aff'd 240 U.S. 403 (1916); *City of Covington* v. *Cincinnati N. & C.R. Co.*, 71 F. 2d 117, 119 (C.A. 6, 1934), cert. den., 293 U.S. 612 (1934); *Ring* v. *Spina*, 148 F. 2d 647, 650 (C.A. 2, 1945), cert. den., 335 U.S. 813 (1948); *Federal Trade Commission* v. *Rhodes Pharmacal Co.*, 191 F. 2d 744 (C.A. 7, 1951). Cf. *Bowles* v. *Quon*, 154 F. 2d 72 (C.A. 9, 1946).

pellees have engaged in unauthorized interstate air transportation, and the Board therefore was entitled to a preliminary injunction.[16]

[16] *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290, 343 (1897); *American Fruit Growers* v. *United States*, 105 F. 2d 722, 725 (C.A. 9, 1939); *Henderson* v. *Burd*, 133 F. 2d 515, 517 (C.A. 2, 1943); *Shadid* v. *Fleming*, 160 F. 2d 752, 753 (C.A. 10, 1947); *Civil Aeronautics Board* v. *Modern Air Transport*, 81 F. Supp. 803 (S.D. N.Y., 1949), affd. 179 F. 2d 622 (C.A. 2, 1950); *Federal Trade Commission* v. *Rhodes Pharmacal Co.*, 191 F. 2d 744 (C.A. 7, 1951). *Cf. United States* v. *San Francisco*, 310 U.S. 16, 31 (1940), reh. den., 310 U.S. 657 (1940).

CONCLUSION

The judgments of the District Court should be reversed and the cases remanded with instructions to issue preliminary injunctions.

Respectfully submitted,

STANLEY N. BARNES,
Assistant Attorney General,
DANIEL M. FRIEDMAN,
Special Assistant to the Attorney General,
Department of Justice,
Washington 25, D. C.,
ROBERT L. GRIFFITH,
Chief, Office of Compliance,
JOHN F. WRIGHT,
Compliance Attorney,
Civil Aeronautics Board,
Washington 25, D. C.

LAUGHLIN E. WATERS,
United States Attorney,
FRANKLIN M. STONE,
General Counsel,
JOHN H. WANNER,
Associate General Counsel,
O. D. OZMENT,
Chief, Litigation and Research Division,
ROBERT L. PARK,
Attorney,
Civil Aeronautics Board,
Washington 25, D. C.

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APPENDIX

The pertinent provisions of the Civil Aeronautics Act of 1938, as amended, are as follows:

Definitions

Sec. 1 [49 U. S. C. 401]. As used in this Act, unless the context otherwise requires—

(3) "Air commerce" means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any civil airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.

(10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

(20) "Interstate air commerce", "overseas air commerce", and "foreign air commerce", respectively, mean the carriage by aircraft of persons or property for compensation or hire, or the carriage of mail by aircraft, or the operation or navigation of aircraft in the conduct or furtherance of a business or vocation, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the air space over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or

possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

(21) "Interstate air transportation", "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the air space over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

Certificate Required

Sec. 401 [49 U. S. C. 481]. (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority [Board] authorizing such air carrier to engage in such transportation * * *.

Judicial Enforcement

Jurisdiction of Court

Sec. 1007 [49 U. S. C. 647]. (a) If any person violates any provision of this Act, or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit issued under this Act, the Authority [Board], its duly authorized agent, or, in the case of a violation of section 401 (a) of this Act, any party in interest, may apply to the district court of the United States, for any district wherein such person carries on his business or wherein the violation occurred, for the enforcement of such provision of this Act, or of such rule, regulation, requirement, order, term, condition, or limitation; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise, restraining such person, his officers, agents, employees, and representatives, from further violation of such provision of this Act or of such rule, regulation, requirement, order, term, condition, or limitation, and enjoining upon them obedience thereto.

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